60474-1

60474-1

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No. 60474-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

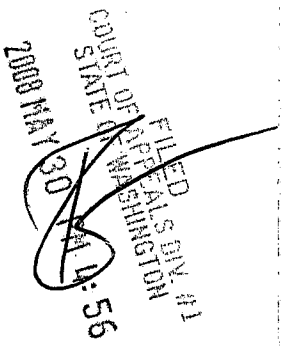
STATE OF WASHINGTON,

Respondent,

v.

JAMES L. ERVIN,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chris Washington

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in calculating James Ervin's offender score.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sentencing Reform Act provides prior class C felony convictions shall not be included in the offender score if, since the last date of release from confinement pursuant to a felony conviction, the offender has spent five consecutive years in the community without committing any crime. Did the trial court err in including Mr. Ervin's two prior class C felonies in his offender score where, after being released from confinement pursuant to a felony conviction, he spent more than five consecutive years in the community without committing any crime?

C. STATEMENT OF THE CASE

Mr. Ervin was charged with and found guilty following a jury trial of one count of felony violation of a no-contact order, domestic violence. CP 1, 35; RCW 26.50.110(1), (5). The charge arose out of an incident that allegedly occurred on September 11, 2006. CP 35.

At the sentencing hearing, the State alleged and the court found Mr. Ervin had the following criminal history:

Juvenile felonies	**Date of Crime**
Burglary 2	01/25/89
Possession of stolen property 2	01/27/91
Adult felonies	
Rendering criminal assistance 1	03/31/94
VUCSA - possess methamphetamine	10/23/05
Adult misdemeanors	
Criminal trespass - domestic violence	04/15/99
Assault 4 - domestic violence	07/28/05
Violation of no-contact order	09/09/05
Protection order violation	12/11/05
Protection order violation	01/19/06
Protection order violation	01/19/06
Protection order violation	01/19/06

CP 41; Sub #66A at 9[1]; 7/24/07RP 1-2, 9-10.

The State argued Mr. Ervin's offender score was a 4. 7/24/07RP 1. The State asserted each of Mr. Ervin's two prior juvenile felony convictions should be counted as one-half point and each of his two prior adult felony convictions should be counted as one point. 7/24/07RP 1-2. The State also asserted Mr. Ervin was on community placement at the time of the current offense and thus one point should be added to the offender score on that basis. 7/24/07RP 2. The State asserted Mr. Ervin's standard sentence range was 22 to 29 months. 7/24/07RP 2.

Defense counsel objected to the State's calculation of the offender score, arguing the offender score was 1, not 4, and the

standard sentence range was 12 to 14 months. 7/24/07RP 3-6, 11-12. Counsel argued Mr. Ervin's 1991 juvenile conviction for second degree possession of stolen property, and his 1994 adult felony conviction for first degree rendering criminal assistance, both class C felonies, "washed out" because Mr. Ervin had spent five consecutive crime-free years in the community. 7/24/07RP 3-6. Counsel also argued the court should not add one point based on the allegation Mr. Ervin was on community placement at the time of the current offense, as the State had not adequately proved the allegation. 7/24/07RP 11.

The State argued none of Mr. Ervin's prior convictions washed out. 7/24/07RP 9-10. The State argued Mr. Ervin did not spend five consecutive crime-free years in the community, because a period of time he spent in jail for a probation violation pursuant to one of his misdemeanor convictions interrupted the wash-out period. 7/24/07RP 9-10.

The trial court agreed with the State that none of the prior offenses washed out. 7/24/07RP 10-11.

Regarding the community placement point, the court acknowledged the State's proof was inadequate and offered to

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[1] A supplemental designation of clerk's papers has been filed for this document.

grant a continuance to allow the State to present the necessary evidence. 7/24/07RP 11. The State declined the invitation, however, and conceded the court and the parties should go forward based on an offender score of 3, without adding a point based on the community placement allegation. 7/24/07RP 12.

The court found Mr. Ervin's offender score was 3 and his standard sentence range was 15 to 20 months. CP 36. The court imposed a sentence of 15 months. CP 38; 7/24/07RP 20.

D. ARGUMENT

THE TRIAL COURT ERRED IN CONCLUDING MR. ERVIN'S TWO PRIOR CLASS C FELONY CONVICTIONS DID NOT WASH OUT AND IN INCLUDING THEM IN THE OFFENDER SCORE

The issue in this case is whether, in calculating a defendant's offender score, the wash-out period is interrupted by a period of time the offender spends in jail on a probation violation pursuant to a misdemeanor conviction. According to this Court's case law interpreting the relevant SRA provision, the wash-out period is "triggered" on the last date of release from confinement pursuant to a felony conviction. The wash-out period can then be interrupted only if the offender commits another crime. Thus, because Mr. Ervin spent five consecutive crime-free years in the community following his last date of release from confinement

pursuant to a felony conviction, his two prior class C felonies washed out and the trial court erred in including them in his offender score.

1. The wash-out period is "triggered" on the last date of release from confinement pursuant to a felony conviction and can be interrupted only if the offender commits another crime. This Court reviews a trial court's interpretation of the SRA de novo. State v. Nichols, 120 Wn. App. 425, 431, 85 P.3d 955 (2004) (citing State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)). The Court's paramount duty in interpreting the statute is to give effect to the Legislature's intent. Nichols, 120 Wn. App. at 431 (citing State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992)). Statutory terms are given their plain and ordinary meaning. Nichols, 120 Wn. App. at 431 (citing Bright, 129 Wn.2d at 265). The Court is to give effect to every word in a statute and will not adopt an interpretation that renders words useless, superfluous, or ineffectual. Nichols, 120 Wn. App. at 431 (citing City of Seattle v. State, 136 Wn.2d 693, 698, 965 P.2d 619 (1998)). When the statute is plain and unambiguous, the Court derives its meaning and the Legislature's intent from the statutory language. Nichols, 120 Wn. App. at 431

(citing In re Parentage of J.H., 112 Wn. App. 486, 498, 49 P.3d 154 (2002)).

The relevant provision of the SRA, RCW 9.94A.525(2)(c), provides:

> Except as provided in (e) of this subsection[2], class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

This provision was amended in 1995. See former RCW 9.94A.360(2); Laws of 1995, ch. 316 § 1 (effective July 23, 1995). Prior to the revision, the statute required that in order for a class C felony conviction to wash out, the offender must have "spent five consecutive years in the community without being convicted of any felonies." Former RCW 9.94A.360(2) (1990). As noted, the current version of the statute requires the offender spend "five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). In all

[2] Subsection (e) applies only if the present conviction is for felony driving while under the influence or felony physical control of a vehicle while under the influence, and thus does not apply to this case. RCW 9.94A.525(2)(e).

other material respects, however, the current statutory provision is identical to the prior provision.[3]

A Class C felony conviction is not to be included in the defendant's offender score if the defendant had five consecutive crime-free years at any time following release from confinement pursuant to a felony conviction. State v. Hall, 45 Wn. App. 766, 769, 728 P.2d 616 (1986). In other words, the five consecutive years need not immediately follow release from confinement for the particular felony at issue. Id.

In interpreting the former version of the statute, this Court determined the provision is divided into two clauses: a "trigger" clause and a "continuity/interruption" clause. Nichols, 120 Wn. App. at 432. Applying principles of statutory construction, this Court concluded the statutory phrase "Class C prior felony convictions . . . shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony

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[3] Prior to the 1995 amendments, the provision stated in full:

> Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without being convicted of any felonies.

Former RCW 9.94A.360(2) (1990).

conviction" triggers the start of the five-year wash-out period. Id. This clause of former RCW 9.94A.360(2) is identical to the current statute. RCW 9.94A.525(2)(c).

Nichols concluded misdemeanors are not relevant to the "trigger" clause because it is only felony convictions that are subject to wash out. Nichols, 120 Wn. App. at 432. Only felony convictions are subject to wash out because, with one exception[4], only felony convictions are included in the offender score. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). The issue in Nichols was whether the time Nichols spent in jail pursuant to two misdemeanor convictions interrupted the wash-out period. Id. at 429. The Court concluded that because Nichols did not commit a new *felony* within five years of his release from confinement pursuant to a felony conviction, there was no event to "trigger" a new wash-out period. Id. at 432-33.

Nichols also interpreted the "continuity/interruption" clause and held Nichols's confinement pursuant to his misdemeanor convictions did not interrupt the five-year wash-out period. Id. The issue was whether the time Nichols spent in jail pursuant to his misdemeanor convictions was time spent "in the community." Id. at

432. The Court rejected the State's argument that jail time for a misdemeanor conviction must interrupt the wash-out period because it is not time spent "in the community." Id. at 429. The Court adopted an "ordinary and usual meaning of community" and concluded "a person's freedom from the local jail or similar confinement unrelated to a felony is not a requisite to being 'in the community.'" Id. at 432. The "in the community" language is not thereby rendered superfluous, however, because

> [i]nstead, it refers to the defendant's status because of the trigger event. In other words, an offender is not 'in the community' if not released from felony confinement. And 'in the community' status ceases when interrupted within five years by a felony conviction.

Id.; see also State v. Smith, 65 Wn. App. 887, 892-93, 830 P.2d 379 (1992) (wash-out period is triggered by release from confinement for any felony, not just felony at issue).

Finally, the Court explained that, taken to its logical extreme, the State's argument would mean that Nichols would be "out of the community" and the wash-out period interrupted for any arrest and detention. Id. at 433. But "[t]he statute plainly requires more -- a felony conviction." Id. Because Nichols spent five consecutive

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[4] Where the current conviction is for a felony traffic offense, the SRA authorizes the court to include serious misdemeanor traffic offenses in the offender score. See RCW 9.94A.525(11).

years without a felony conviction, his three class C prior felonies washed out and could not be included in his offender score. Id.

Although Nichols interpreted a prior version of the statute, its reasoning and outcome apply equally to the current version of the statute at issue in Mr. Ervin's case. The "trigger" clause of the current statute is identical to the prior version addressed in Nichols. Thus, the five-year wash-out period for any particular class C felony offense is triggered on the last date the offender is released from confinement pursuant to any felony conviction. Nichols, 120 Wn. App. at 432; RCW 9.94A.525(2)(c). If the offender is confined for a probation violation pursuant to a felony conviction, the last date of release from confinement for the probation violation triggers the start of the five-year period. State v. Blair, 57 Wn. App. 512, 515-16, 789 P.2d 104 (1990). But confinement for a probation violation pursuant to a misdemeanor offense does not trigger a new five-year wash-out period.

The "continuity/interruption" clause of the current statute is different from the prior version addressed in Nichols, but not in any way material to Mr. Ervin's case. The prior version of the statute provided the wash-out period would be interrupted if, after being released from confinement for a felony offense, the offender were

"convicted of any [subsequent] felonies." Former RCW 9.94A.360(2) (1990). The current version provides the wash-out period is interrupted if the offender "commit[s] any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). Thus, under the current statute, the wash-out period will be interrupted if the offender commits a misdemeanor or a felony offense. But because confinement pursuant to a misdemeanor offense is considered time spent "in the community," the wash-out period will not be interrupted by time spent in confinement pursuant to a misdemeanor offense. Nichols, 120 Wn. App. at 432-33.

2. Because Mr. Ervin spent five consecutive years in the community without committing a crime, his two prior class C felony offenses washed out and should not have been included in his offender score. As stated, the issue is whether Mr. Ervin spent five consecutive crime-free years in the community following the last date of release from confinement pursuant to a felony conviction.

Mr. Ervin has two prior convictions for class C felonies: (1) second degree possession of stolen property, committed on January 27, 1991; and (2) first degree rendering criminal assistance, committed on March 31, 1994. CP 41; Sub #66A at 9; 7/24/07RP 1-2, 9-10. Mr. Ervin was released from confinement

pursuant to the 1994 offense in October 1994. 7/24/07RP 9. Mr. Ervin then committed the misdemeanor offense of criminal trespass, domestic violence, on April 15, 1999. 7/24/07RP 9. But he remained crime-free for more than six years before committing fourth degree assault, a misdemeanor, on July 28, 2005. Sub #66A at 9. Thus, because Mr. Ervin spent more than five consecutive crime-free years in the community following the last date of his release from confinement for the 1994 offense, his two prior class C felonies washed out and should not have been included in the offender score.

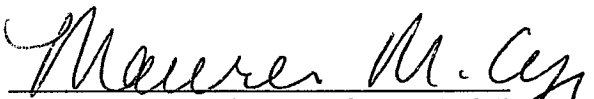
Although Mr. Ervin spent several days in jail from January 25 to February 11, 2002, for violating the terms of his probation for the 1999 misdemeanor offense, that confinement was not pursuant to a felony conviction. Thus, it was time spent "in the community" and did not interrupt the five-year washout period. Nichols, 120 Wn. App. at 432-33.

E. CONCLUSION

Because Mr. Ervin spent at least five consecutive crime-free years in the community following his last date of release from confinement pursuant to a felony conviction, his two prior class C felony convictions washed out. His sentence must be reversed and

remanded for resentencing without inclusion of the two convictions in his offender score.

Respectfully submitted this 30th day of May 2008.



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DIVISION ONE

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	)	
Respondent,	)	
	)	NO. 60474-1-I
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	)	
JAMES ERVIN,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 30TH DAY OF MAY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JAMES ERVIN 1402 S 8TH ST., APT. A TACOMA, WA 98402	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MAY, 2008.

X_____

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